IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.782 OF 1992.

The Union of India
the General Manager Central
Railway owing and representing
the Railway Administration
having its Head Quarters/
Office at V.T.Bombay. : Appellants.

versus

M/s.WIMCO LTD. : Respondent.

Mr.A.N.Samant for the appellants.
Mr.R.S.Apate for the Respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 16th August 2005.

ORAL ORDER

1. By this appeal the Union of India has challenged the order of the Tribunal awarding compensation to the respondent.

2. Mr.Samant, the learned counsel for the

appellants, has raised only three contentions. Firstly, he contended that the Railway Receipt was issued by the Railway as "Said to Contain" basis.

3. Secondly, he contended that the tribunal has awarded interest at the rate of 12% per annum. According to him, it should be 9% per annum in view of the judgment of this Court reported in **2005 (1) Mh. L.J. 165 [Maharashtra State Electricity Board vs. Union of India].** It was a claim against the railways and the interest was awarded ultimately by the High Court at 9% per annum. I had also followed the same judgment earlier, therefore, the rate of interest is to be reduced to 9% per annum.

4. Thirdly he contended that the railways had paid and settled claim at Rs.72,869/- in full and final settlement of the respondents' claim. He further contended that the railways had stated in the letter sent to the respondents that in case the amount is not accepted in full and final settlement the cheque should be returned and if the cheque is accepted, the respondents are estopped from making the claim.

5. So far as this submission of Mr.Samant is concerned, it is covered by the Judgment reported in **AIR 1968 Bombay 294 (Union of India v. Babulal Uttamchand).** In view of this judgment, I find that by accepting the cheque the claimants do not loose their right for claiming the balance compensation. Hence I reject this contention of Mr.Samant.

6. So far as the contention of Mr.Samant regarding RR with the endorsement "Said to Contain" is concerned, the same is required to be rejected. In this case, the claimant had entrusted a consignment of 120 drums of paraffin wax booked under RR 079326 dated 6.12.1981 for carriage from Digboy to Ambernath. The gross weight of the goods was 21648 kgs. Railway delivered 55 drums weighing 9704 kgs. against 120 drums of 21648 kgs. Therefore, the claimant contended that there was a shortage of 11021 kgs. of the value of Rs.94582/-. The railways paid Rs.72869/- deducting Rs.21713/- without assigning reasons. The claimant did not agree for the deduction without any reasons hence he filed a claim petition for recovery of Rs.21713. The

Tribunal framed as many as 4 Issues but the Issue regarding RR "Said to contain" was not at all framed. The tribunal found that there was total negligence in respect of the short delivery. The said to contain does not arise in the case and has to be rejected as the railways had paid a sum of Rs.72869/- against the claimant’s claim of Rs.94582/- on the basis of beejuck price. It is not open to the railways to reduce the compensation for the agreed shortage by 30% without any reason. Hence this submission Mr.Samant is rejected.

7. Railways can raise defence of said to contain when railways dispute the quantity entrusted to them and accept the representation of the consignor in that regard for the purpose of freight charges. However, the claim in this case is on the basis of actual damage certificate and if the actual damage suffered can be ascertained on the basis of the evidence on record, then question as to how much quantity was entrusted to the railways becomes secondary. The damage certificate shows that railways were in a position to make assessment of the damages in respect of the bags, number of bags actually

damaged under the invoice. The tribunal has accepted that the weight of the each bag was 40 kgs. as per the evidence of the claimant. In the circumstances, the defence of said to contain is not available to the appellants.

8. So far as interest part is concerned, the contention of Mr.Samant is required to be accepted in view of the judgment of this court, as stated above.

9. Mr.Samant for the appellant states that the appellant has deposited the amount. In the result, I pass the following order:-

:ORDER:

. The Appeal is partly allowed.

. The principal amount awarded will carry interest at the rate of 9% per annum from the date of application up to the date of withdrawal by the claimant of the amount deposited by the railways pursuant to the order of this court or up to the date of investment with proportionate costs of the tribunal.

. so far as this appeal is concerned, no order as to costs.

[D.G.DESHPANDE]